

FORMALISM, MORALITY AND OVADIA YOSEF: A RESPONSE TO DANIEL STATMAN

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Thank you for the opportunity to respond to this fascinating paper. It makes a compelling case for viewing the question of the role of morality in Halakha as a historical question and opens up many possibilities for what such an investigation might reveal. In this very short response I will suggest that one of the things that such a historical investigation may find is that the boundaries between halakhic-formalistic and moral considerations might not always be clearly delineated. Rather, some formalistic statements can be ways of articulating moral concerns in formalistic language.

On the basis of his discussion of religion and morality on pages, it seems that Statman is defining halakhic formalism as appeal only and exclusively to explicitly revealed commands, as well as laws and principles derived from them, as a source of norms. Adding moral considerations would be to invoke a principle that is not contained in the Written or Oral Torah, or anywhere in the Jewish legal system, but is instead derived from rational thinking about ethics and morality. He

contrasts this with formalism, which he defines as “strict adherence to the written law and to precedents which give decisive weight to the formalistic aspects of the law: to the written law, to procedures, to precedents, etc.” In other words, Statman asks whether, historically, *poskim* arrive at (or justify) their decisions on the basis of legal principles (codes and precedents) or whether they invoke moral considerations which are external to the legal system. I would suggest that there is another possibility: that there are formalistic principles which are internal to the halakhic system and based on precedent and that are themselves ways of articulating moral considerations. I mean by this principles which give the appearance of simple, easily applied rules that yield give unequivocal answers, and yet powerfully articulate moral values that the halakhic decision-maker is choosing to find in the halakhic system.

Bearing in mind the danger of generalizing too much from a single example, I would like to look at one particular case, against which Statman warns: in his responsa, “Ceding Territory of the Land of Israel in Order to Save Lives,”¹ R. Ovadia Yosef issues the controversial halakhic judgement that it is both permitted and necessary to give portions of the land of Israel to “Ishmaelites” if doing so will prevent war or bloodshed. This responsa allowed the Shas party, of which R. Yosef was the spiritual leader, to join and remain in the Israeli government while it negotiated the Oslo agreement. I see Rabbi Ovadia Yosef’s responsa as a good example for this discussion precisely because, despite his often controversial political statements, in his legal writings he is not known for his “judicial activism.” Rather the opposite, his halakhic decisions tend to read like encyclopedia entries on the topic in question, with the decision arrived at by simple tallying of the precedents for and against. As Marc Spiro writes in his review of Rabbi Yosef’s biographies:

While R. Ovadiah is certainly a great technician, able to collect sources and come to conclusions by balancing views off one another, we are not confronted by any advanced thinking or grand theories that make a

¹ Ovadia Yosef, “Ceding Territory of the Land of Israel in Order to Save Lives,” *Crossroads: Halacha and the Modern World III* (Alon Shvut: Zomet, 1990).

contribution to knowledge. There are no *hiddushim* (novellae) in the classic sense in R. Ovadiah's writings. Even in his responsa, which overwhelm one with their sheer breadth, one finds that on almost every page R. Ovadiah cites a view, notes that this view is not *mukhrah* (necessary), and then cites a group of *aharonim* (later scholars) who disagree with this view. Yet hardly ever does he explain why the rejected opinion is wrong, or how its author has misread the Talmud or *rishonim* (earlier scholars).²

On the other hand, there were clearly extra-halakhic motivations behind Rabbi Yosef's writing of this particular responsa. Some were political and had to do with the role of Shas in a Labour-led coalition government.³ Other concerns were more explicitly ethical. A newspaper interview quotes Rabbi Yosef as follows:

Is it possible that Jewish blood should be spilled like water? I personally knew some of the boys who were killed and I learned about the circumstances in which they were killed. The horror! How could I allow them to die for a piece of land? For a hill or mountain?⁴

Margalit Katzir, Rabbi Yosef's granddaughter, similarly describes his horror of war as coming out of his work permitting the remarriage of wives of men who went missing in the Yom Kippur war:

With stormy emotions the Rabbi described the days that passed while he was dealing with the files of the agunot after the Yom Kippur War. The examination of the battlefield remains – the eyewitnesses were shattered and miserable. At night the Rabbi did not know rest and he saw before his eyes the ashes of the slain blowing over the Sinai sands...is it possible that he would decide that the halakha is that it is permitted to endanger the life of a person for a piece of land, even if it is in the land of Israel?⁵

² Marc B. Shapiro, "Mi-Yosef ad Yosef Lo Kam keYosef," *Meorot* 6, no. 1 (2006): 15.

³ See Ariel Pikard, *Mishnato shel harav Ovadia Yosef beidan shel tmurot* (Ranat Gan: Bar Ilan University Press, 2007), 157-158; Nitzan Hen and Anshil Pepper, *Maran Ovadia Yosef: Habiographia* (Jerusalem: Keter, 2004), 314-325.

⁴ Hen and Pepper, 238.

⁵ Ibid.

These statements of Rabbi Yosef's seem to be what Statman describes in his article: a halakhic decision-maker taking a position because it prevents suffering. Yet in the responsa itself Rabbi Yosef uses only reasoning internal to halakhic precedent, so much so that his biographers Hen and Pepper can describe his approach as "purely halakhic." Since this biography carries Rabbi Yosef's seal of approval, one can surmise that this is also how he would like his approach to be understood.

In this responsa, Rabbi Yosef articulates his moral concerns through the use of the halakhic principle *pikuach nefesh*, or the principle of doing whatever is necessary to save lives. he begins by establishing that the principle of saving lives is greater than any other commandment in the Torah. He then examines the prohibition in question—"They will not settle in your land",—which is taken by some medieval and post-medieval halakhic authorities as prohibiting Jews from permitting non-Jews to reside permanently and take ownership in the land of Israel. As Rabbi Yosef shows at length, there are variant positions on the scope of this prohibition. Does it apply only to idolaters or also to non-idolatrous non-Jews? Does it apply when Jews are subordinate or only when they are in a position of power? The most stringent position is that of Maimonides, who states that even when Jews are subordinate they should not sell property in the land of Israel to a non-Jew, even to a non-idolater (Maimonides, *Laws of Idolatry*, 10:4). This, according to Rabbi Yosef, is the prohibition that would be violated by a land-for-peace agreement. Rabbi Yosef then shows that although a minority of subsequent halakhic scholars uphold Maimonides' position, a much larger majority hold that there is no prohibition to sell land in Israel to non-idolaters and that, since Muslims ("Ishmaelites") are not idolaters, it is certainly permitted to sell to them. Some later scholars, Rabbi Yosef then shows, even suggest that Maimonides did not in fact intend to prohibit selling land to non-Jews, but only giving it to them for free (although R. Yosef is not convinced on this point). Further, as Rabbi Yosef shows, all the scholars who lived in the land of Israel and had to decide this question as a matter of practical law came to the conclusion that it is permitted. If there were no reason not to obey the stringent Maimonidean approach it might be laudable to do so,

but, since one may do even clearly prohibited things in order to save lives, it is obvious that one should not take a stringent opinion at the cost of endangering lives.

The structure of this responsa is thus formalistic. The prohibition is identified and named, and then there is an exhaustive survey of scholars who hold that the prohibition applies in this case. After concluding that the prohibition is based on a minority opinion, he then argues that in this case it is outweighed by a more important legal requirement: the requirement to save lives.

The structure of the decision seems so value-neutral that one could imagine a rabbi deciding on the kashrut of a blemished chicken using an almost identical format: listing rabbis that permit or forbid in this case and concluding that the majority permit and that, since the person with the chicken is hungry, it is better to be lenient. Still, Rabbi Yosef is using this language of formalistic decision-making to express a core value: life is more important than land. I would suggest that this is not a difference from the case of the chicken but rather a similarity with it. There the value expressed might be articulated in the form of the halakhic principle “the Torah has mercy on the money of the children of Israel” or even the halakhic importance of enjoying the sabbath with delicious food. Unlike saving lives, these are halakhic principles that do not trump everything, but they do trump some things, like ambiguously-kosher chickens.

The arguments against Rabbi Yosef’s responsa, from those opposed to a land-for-peace settlement on halakhic grounds, have gone in two directions. The first is to argue that in the current situation more lives are likely to be endangered by returning territories than by holding them. This approach accepts R. Yosef’s halakhic and moral claims, but simply argues that the reality is not as he describes it.⁶ This seems to be R. Yosef’s

⁶ Similarly, R. Sholom Gold argues that Rabbi Dr. Aharon Lichtenstein’s letter which, similar to R. Yosef’s responsa, permits and encourages exchange of territories as part of a negotiated settlement, would not apply now because circumstances have changed (<http://www.israelnationalnews.com/Articles/Article.aspx/5496>). Rabbi Shlomo Toledano criticizes R. Yosef’s conclusion not on the basis of its halakhic argumentation, but on the basis of the facts that R. Yosef implicitly assumes: that territorial compromise will lead to peace

grounds for opposing the Gaza evacuation in 2005. The other is to argue that the state of Israel is engaged in a commanded war and, since it is in the nature of war that people are killed, this is not a commandment that can be overruled because of danger to life. As Rabbi Amos Bardea of Gush Emunim wrote in 2005:

The principle of saving lives is a halakhic principle that the people of Gush Emunim would not deny. Saving lives is not relevant in connection to a commandment that is in its essence about fighting.⁷

Bardea's claim also strikes me as a moral one, and as a formalistic way of articulating what might otherwise be stated as the idea that a national homeland is among the values worth dying for.

Using formalistic statements to make moral arguments is not confined to contemporary political debates. The Talmud states, in Sanhedrin 72b, that abortion is permitted because the fetus falls into the halakhic category of pursuer (*rodef*), someone who attacks you and whom you are permitted to kill. The law of the *rodef*, as it appears in the Babylonian Talmud Sanhedrin 73a, permits (or possibly requires) one to kill someone who is pursuing someone to murder them. By calling the fetus a pursuer, the Talmud makes an analogy between a murderer pursuing his victim and a fetus endangering its mother's life. This is a decision on formalistic grounds: it is permitted to kill an attacker, therefore it is permitted to kill an attacking fetus. At the same time, this decision makes clear that a woman has a right to self-defense, even from things happening in her own body, and that she does not have a moral obligation to sacrifice herself for another's life (just as no one has to die to save the life of someone who is attacking them). The principle of the right to kill a pursuer is, like the principle of the requirement to do whatever necessary to save lives, an internal halakhic principle that can be applied formalistically. Other possible examples of formalistic rules that can be used to articulate moral considerations might include the principle that *kavod habriot* (human

and that the Palestinians do not desire the destruction of Israel (www.lifshiz.macam.ac.il/documents/toledano/israelQ.doc).

⁷ http://www.tzionut.org/oldsite/tzionut/tzionut.org/articles_detailscdef.html?id=38.

dignity) overrules Rabbinic prohibitions and requirements, because the Rabbis never intended that their laws be applied when this would harm human dignity (b.Berachot 19b), and the principle of *midat sedom* (the prohibition of acting like a Sodomite), which prohibits exercising one's rights in a way that unnecessarily damages others, the classic Talmudic case being taking as an inheritance a field that adjoins someone else's field when there is a field elsewhere one would be equally happy to inherit (b.Bava Batra 12b).

These examples suggest that there might not be a dichotomy between moral and formalistic, and that some formalistic rules might be a way of thinking through moral issues in a different language. If that is the case, then we can see some formalistic rules as powerful tools for articulating moral concerns in a concrete way that has standing within the halakhic system. The principle that saving a life takes precedence over all other commandments does not simply state that life has a high value; it requires one to act in ways to preserve it. Conversely, it also has tools for articulating when that value might not be applicable, such as in the case of a pursuer, or perhaps in the case of a commanded war. What it does not do is impose objective standards, although it may sometimes give the appearance of doing so. After all, someone must decide when life is endangered, and people will perceive danger differently depending on where they stand. Does it endanger more lives to help establish a Palestinian state or to try to make sure one never arises? Is the threat to a woman's psychological health of having to give birth to a child she does not want enough of a danger to consider the child a *rodef*? In both questions, the application of formalistic rules will be different depending on the moral considerations of the one making the decision.